

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 195, AFL-CIO and Warren Petroleum Company and Fontenot Construction Company, Inc.
Cases 23-CD-414 and 23-CD-415

March 23, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Warren Petroleum Company, herein called Warren, and Fontenot Construction Company, Inc., herein called Fontenot, alleging that United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 195, AFL-CIO, herein called Respondent, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activities with an object of forcing or requiring Warren and Fontenot to assign certain work to employees it represents rather than to unrepresented construction workers employed by Fontenot.

Pursuant to notice, a hearing was held before Hearing Officer Donald R. Lewis on September 30, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Warren filed a brief and Respondent filed a statement of position. Respondent filed a motion to quash the 10(k) notice of hearing which was opposed by Warren.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

The Board has considered the briefs and the entire record in this case, and hereby makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that Warren, a division of Gulf Oil Corporation, is a Delaware corporation engaged in the manufacture, purchase for resale, and sale of liquefied gas products at its facility located at Port Arthur, Texas. During the past 12 months, a representative period, Warren

purchased goods and materials from outside the State of Texas valued in excess of \$50,000, the same goods and materials being shipped into the State of Texas. During the same period of time, Warren sold and shipped goods valued in excess of \$50,000 to points directly outside the State of Texas from its Port Arthur, Texas, facility. During the past 12 months, Warren also had sales exceeding \$500,000.

The parties further stipulated, and we find, that Fontenot is a Texas corporation engaged in construction and lease maintenance work with an office and place of business in Winnie, Texas. During the past 12 months, a representative period, Fontenot purchased goods and materials from outside the State of Texas valued in excess of \$50,000, the same goods and materials being shipped into the State of Texas. During the same period of time, Fontenot had sales exceeding \$500,000.

Accordingly, we find that Warren and Fontenot are employers within the meaning of Section 2(2) of the Act, and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

Warren's Port Arthur facility is a small marine marketing terminal which is utilized to handle natural gas and naphtha product.¹ Warren contracts out the vast majority of its construction and maintenance work at this facility to Fontenot, a general contractor with approximately 50 employees, all of whom are unrepresented. Fontenot derives about 20 percent of its gross income from its work for Warren.

In December 1980, Fontenot began to install a fire control system at the Port Arthur terminal. Donald Rose, Warren's operations supervisor at Port Arthur, testified at the hearing that, on February 11, 1981, two men who introduced themselves as representatives of Respondent visited his office and told him that Fontenot was performing "their work" and they were not going to let any "out-of-town non-union contractor take it" from them. Rose replied that he was powerless to change the

¹ Warren operates approximately 63 facilities including 27 in the State of Texas.

assignment because it was made in Tulsa. Respondent's representatives responded that they would prevent completion of the work.

Thereafter, on March 2, 1981, a group of 25 to 30 individuals gathered at the Warren terminal gate at the Port Arthur facility. Several of them shouted that Fontenot was stealing work from them and threatened to physically harm employees of Fontenot and Warren. In fact, the demonstrators threw rocks which struck several vehicles and one Warren employee.²

On August 27, 1981, Respondent's business representative, Jack Taylor, met with Fontenot's president, Charles Fontenot, and told him that the Port Arthur project was union work. He stated that Fontenot would have to use union personnel, and offered to supply him with employees. Taylor stated that if Fontenot refused, union members would "come out in force and show their disapproval."³

The next day, approximately 10 members of Respondent picketed the contractor's gate at the terminal. Their signs suggested that Fontenot was paying substandard wages to its employees.⁴ Deborah Cantrell, a supervisor in the Gulf Oil Company's industrial relations department, asked several picketers what the dispute was about. They responded that "that is our work" and that they would not move until they got the work.

Members of Respondent picketed at the Port Arthur facility each day through September 1, 1981.

B. The Work in Dispute

The work in dispute consists of the fabricating, laying, and connecting of all pumps and piping and appurtenances for a fire control system at the Warren Petroleum Company's Port Arthur, Texas, terminal located off Mexican Dock Road.

C. Contentions of the Parties

Respondent contends that there is no jurisdictional dispute herein. Rather, Respondent asserts that its sole objective has been to have Fontenot recognize it as the collective-bargaining representative of its employees, and that it has not exceeded the time period permitted for recognition picketing under Section 8(b)(7)(C) of the Act. On October 8, 1981, Respondent filed with the Board a motion to quash the notice of 10(k) hearing.

² A number of the demonstrators wore clothing on which Respondent's insignia was printed.

³ This account of the conversation is based on Fontenot's testimony. Fontenot's version does not differ substantially from Taylor's but is more complete and comprehensible.

⁴ The record does not precisely indicate the message on the signs.

Warren and Fontenot contend that the object of Respondent's actions was to force or require them to assign the work in dispute to its members, and that, therefore, the statute applies to the facts of this case. Warren and Fontenot further contend that the work should be assigned to the unrepresented construction workers employed by Fontenot because of their skills, the economy and efficiency of operations, past practice, and employer preference.

D. Applicability of the Statute

Section 10(k) of the Act empowers the Board to determine a dispute out of which an 8(b)(4)(D) charge has arisen. However, before the Board proceeds with a determination of the dispute, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method, binding on all parties, for the voluntary adjustment of the dispute.

Respondent contends that the statute does not apply because it acted solely for recognition purposes. However, this contention is belied by statements of its members and representatives prior to and during the picketing. Thus, during their aforementioned February 11, 1981, discussion with Rose, Respondent's representatives asserted that Fontenot was taking away "their work." Members of Respondent echoed this theme during the March 2 demonstration when they shouted that Fontenot was "stealing work from them." These statements and the statements of the picketers to Cantrell clearly indicate that Respondent was attempting to secure the work in dispute for its members.

Although Respondent's picket signs apparently suggested only that Fontenot was paying substandard wages, the record does not reveal any attempt by Respondent to ascertain whether Fontenot was actually paying its employees in conformity with area wage standards. In these circumstances, the wording of the signs does not convince us that the picketing was for purposes of recognition.

Moreover, even if *one* object of Respondent's conduct was recognition, the circumstances surrounding the picketing provide us with reasonable cause to believe that another object of the picketing was to force or require Fontenot or Warren to assign the work to individuals represented by Respondent. On the basis of the entire record, we conclude that there is reasonable cause to believe that Respondent violated Section 8(b)(4)(D) of the Act.

No party contends that there exists an agreed-upon method for the voluntary resolution of the dispute which is binding on all of the parties. Accordingly, we conclude that the dispute is properly

before the Board for determination under Section 10(k) of the Act and Respondent's motion to quash the notice of the 10(k) proceeding is denied.

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to relevant factors.⁵ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience, reached by balancing those factors involved in a particular case.⁶

The following factors are relevant in making the determination of the dispute before us:

1. Certifications and collective-bargaining agreements

The parties stipulated, and we find, that there is no Board certification or bargaining order requiring either Fontenot or Warren to bargain with Respondent or to assign work to employees represented by Respondent or any other labor organization. We also find that neither Fontenot nor Warren is a party to a collective-bargaining agreement with Respondent or any other labor organization covering the work in dispute. Accordingly, we find that the factors of certification and contract are not relevant herein.

2. Area practice

The record does not include any evidence with respect to area practice. Accordingly, we find that this factor is not relevant to our determination.

3. Relative skills, efficiency, and economy

The record indicates that members of Respondent as well as the unrepresented construction workers employed by Fontenot are capable of performing the welding and pipefitting work that is needed for the project. Unlike welders who are members of Respondent, however, the unrepresented employees are permitted to perform the other tasks necessary to complete the fire control system, e.g., excavating trenches.⁷ The record further indicates that employees of Fontenot have previously performed various projects at the Port Arthur terminal and are familiar with the physical layout of the plant, including the location of underground lines. Moreover, at the time of the hearing, Fontenot's employees had performed 90 to 95 percent of the

project, and it would be inefficient to have the work completed by a different contractor. Accordingly, we find that the factors of economy and efficiency favor an award to the unrepresented construction workers employed by Fontenot.

4. Employer practice and preference

As previously noted, Fontenot has completed numerous projects for Warren over the years at the Port Arthur terminal and elsewhere. Representatives of Warren indicated that they have been satisfied with Fontenot's previous work, and that the work on the disputed project to date is acceptable. The record indicates that Warren maintains a preference for its assignment to the unrepresented construction workers employed by Fontenot. This factor, therefore, favors an award to the unrepresented construction workers employed by Fontenot.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the unrepresented construction workers employed by Fontenot Construction Company, Inc., are entitled to perform the work in dispute. We reach this conclusion relying on efficiency and economy of operations and Warren's practice and preference. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Unrepresented construction workers employed by Fontenot Construction Company, Inc., are entitled to perform the work of fabricating, laying, and connecting all pumps and piping and appurtenances for a fire control system at the Warren Petroleum Company's Port Arthur, Texas, terminal, located off Mexican Dock Road.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 195, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Warren Petroleum Company and Fontenot Construction Company, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, United Association of Journeymen and Apprentices of the Plumbing

⁵ *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [Columbia Broadcasting System], 364 U.S. 573 (1961).

⁶ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

⁷ Taylor testified that welders who are members of Respondent would not clean out trenches. He stated that "they have laborers to do that."

and Pipe Fitting Industry of the United States and Canada, Local Union No. 195, AFL-CIO, shall notify the Regional Director for Region 23, in writing, whether or not it will refrain from forcing Warren Petroleum Company and Fontenot Con-

struction Company, Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.